possible as under,' with a list of names with amounts against them. It was held that the moneys standing to the credit of both the current account and the deposit account belonged to the wife as survivor, and that the document did not raise any presumption that the husband regarded the deposit as his own property."

In my opinion the present contents of the box are the joint property of the plaintiff and the defendant during their lives which will become the absolute property of the survivor on the death of the other.

As notice of severance was given by the defendant in April 1964 the plaintiff and the defendant are entitled to the contents of the box now in equal shares.

Order accordingly.

Solicitor: *Harbans, Kamil & Wilson; R. C. H. Lim & Co.*

ALSAGOFF v. ROBIN & ORS.

[O.C.J. (Choor Singh J.) October 10, 1964]

[Singapore — Suit No. 1229 of 1961]

Vendor and Purchaser — Property mortgaged by fraudulent agent — Purported sale by mortgagee — Mortgagee having no title to property — Mutual fundamental mistake — Total failure of consideration — Conveyancing and Law of Property Ordinance (Cap. 243), 7(1)(F).

Agency — Agent fraudulently mortgaging property — Mortgagee exercising power of sale — Whether purchase price recoverable.

The plaintiff's agent by a forged power of attorney purported to mortgage certain properties to the first and second defendants as security for the repayment of a loan of $6,000. Subsequently the first and second defendants sold and conveyed the properties to the third defendant in exercise of the power of sale conferred on them as mortgagees. The plaintiff brought an action for a declaration that the purported mortgage and conveyance were null and void and judgment was entered in his favour against all three defendants. The third defendant thereupon claimed recovery of the purchase price and costs against the first and second defendants on the ground that the conveyance to him was null and void and that there was a total failure of consideration.

Held: (1) equity will not undo a sale of land after conveyance on the ground of mistake unless there has been a total failure of consideration;

(2) in this case there has been a total failure of consideration resulting from mutual fundamental mistake and therefore the third defendant was entitled to recover the purchase money from the first and second defendants.

Per Choor Singh J.: A purchaser who after completion of the contract discovers that he has obtained a defective title to the land may sue for rescission of the contract and the return of the purchase money, if the agreement of sale was entered into under a mistake common to both parties, as to some fact which was a condition precedent to their contracting.

Cases referred to:—

(1) *Solle* v. *Butcher* [1950] 1 K.B. 671.

(2) *Cooper* v. *Phibbs* (1867) 2 H.L. 149.

(3) *Debenham* v. *Sawbridge* [1901] 2 Ch. 98.

(4) *Bingham* v. *Bingham* (1748) 1 Ves. Sen. 126.

(5) *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186.

(6) *Clare* v. *Lamb* (1874-5) 10 C.P. 334.

SUIT.

N. A. Mallal for the plaintiff.

R. L. Eber for the 1st and the 2nd defendants.

K. E. Hilborne for the 3rd defendant.

Cur. Adv. Vult.

Choor Singh J.: The plaintiff brought this action for a declaration that two deeds relating to the land and premises known as Nos. 52 and 52A Kerbau Road, Singapore, are void. They are:—

(1) a statutory mortgage dated the 3rd May 1960 purporting to have been made by the plaintiff in favour of the first and second defendants, and

(2) a conveyance dated the 30th June 1961 executed by the first and second defendants as vendors in favour of the third defendant as purchaser.

The undisputed facts are as follows. The plaintiff became the owner of the above-mentioned property by virtue of a conveyance registered on the 21st August 1941. The plaintiff's above-mentioned and other properties in Singapore were managed by the plaintiff's agent, Syed Abdullah bin Ahmad bin Shaik Alsagoff until the agent's death on the 12th October 1942. From that date the agent's son, Syed Abdulrahman bin Abdullah Alsagoff, managed the plaintiff's above-mentioned and other properties as his agent. Acting under a power of attorney dated the 6th April 1958, which purported to have been executed by the plaintiff in favour of Syed Abdulrahman bin Abdullah Alsagoff, the latter by a mortgage dated the 3rd May 1960 mortgaged the plaintiff's above-mentioned property in favour of the first and second defendants as security for the repayment of a loan of $6,000. By a conveyance dated the 30th June 1961 the first and second defendants sold and conveyed the above-mentioned property to the third defendant for $6,500 in exercise of the power of sale conferred on them as mortgagees by the Conveyancing and Law of Property Ordinance (Cap. 243).

The plaintiff never executed the power of attorney in favour of Syed Abdulrahman bin Abdullah Alsagoff and never authorised him to mortgage the plaintiff's above-mentioned property. The power of attorney was a forgery. The plaintiff received no benefit whatsoever from the mortgage of his property or from the conveyance in favour of the third defendant.

On the 20th September 1963 the first and second defendants consented to judgment in favour of the plaintiff. On the 24th September 1963 judgment by consent was accordingly

entered declaring the mortgage dated the 3rd May 1960 null and void, directing the Registrar of Deeds, Singapore, to cancel the registration of the mortgage, and staying all further proceedings herein between the plaintiff and the first and second defendants.

On the 9th April 1964 the third defendant consented to judgment in favour of the plaintiff. On the 16th April 1964 judgment by consent was accordingly entered declaring the conveyance dated the 30th June 1961 null and void, directing the Registrar of Deeds, Singapore, to cancel the registration of the conveyance, and directing the third defendant to hand over to the plaintiff all title deeds relating to the above-mentioned property.

The only issue therefore left to be tried before me is the claim of the third defendant, Goh Boon Choo, against the first and second defendants. The third defendant claims the sum of $6,500 and conveyancing costs amounting to $187.75 on the ground that the conveyance dated the 30th June 1961 was null and void and that there was a total failure of consideration for the sum of $6,500 paid by the third defendant to the first and second defendants as the purchase price for the above-mentioned property. Alternatively, the third defendant claims that if the conveyance was not wholly void, it is voidable or liable to be set aside on the ground of fundamental mistake of all parties thereto.

It was submitted by counsel for the third defendant that where there is a mutual fundamental mistake of fact a court of equity will grant relief even though the sale of land has been completed. Counsel relied on the following passages in *Halsbury's* Laws of England, third edition, volume 26, pages 910 and 912:—

> "A contract entered into under a mutual mistake of fact is liable to be rescinded at the suit of either party. The nature of the mistake and cause of it must be considered in determining whether relief ought to be granted." .. ..
>
> "When a mutual mistake of a fundamental character is proved, the court may, in a proper case, grant rescission of sale or lease of land even after conveyance."

Counsel cited the following cases in support of his submission: *Solle* v. *Butcher,*[1] *Cooper* v. *Phibbs,*[2] *Debenham* v. *Sawbridge,*[3] *Bingham* v. *Bingham* [4] and *Svanosio* v. *McNamara.*[5]

The first and second defendants relied entirely on the Conveyancing and Law of Property Ordinance. Their counsel argued that the sale was a mortgagee's sale and no covenant was given as to title in the conditions of sale; that the first and second defendants sold the property as mortgagees in exercise of their statutory power of sale; and that the only covenant for title to be implied when a person is expressed to convey as a mortgagee is to the effect stated in section 7(1)(F):—

> "That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject matter of the conveyance, or any part thereof, is or may be impeached, charged, affected or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed."

It was said that the maxim, *caveat emptor,* applies; and that the vendors' position was made clear in the particulars of sale which stated that it was a mortgagee's sale and that the vendors were selling as mortgagees and shall not be required to enter into any covenant of title. It was stressed that once the transaction has been reduced to a conveyance the court must look at the conveyance only; and that the rights of the parties must be assessed by what the conveyance says. It was pointed out that the third defendant had only himself to blame because he never took a covenant for a good title; that he had opportunity to investigate title; that if he wished to be protected he should have taken a covenant for good title; that before the third defendant could succeed he had to show that there was such a covenant; and that as there was no such covenant the third defendant's claim against the first and second defendants must fail.

The only case cited in support of these submissions was *Clare* v. *Lamb.*[6] In that case leasehold properties were mortgaged by S, who subsequently married L. After the death L, his executors sold the properties by auction in the *bona fide* belief that L was legally entitled to the equity of redemption. By the conveyance, to which the executors were parties, the mortgage was transferred to the purchaser, and the equity of redemption, the value of which was agreed to be £240, was also conveyed to the purchaser. Later the widow discovering that the equity of redemption was in her, filed a bill in equity, and a decree was made declaring her to be entitled to it. The question submitted at the trial was, whether the purchaser, having paid the £240 for property to which the vendors had no good title, could recover back that sum as money had and received, upon a failure of consideration. It was held that the purchaser could not recover back the money paid to the executors, as upon a failure of consideration; but must have recourse to his remedy upon the covenant for title, if any.

In his reply counsel for the third defendant submitted that the third defendant's claim was not based on a covenant. This submission I accept. Counsel further submitted that the claim was based on a mutual fundamental mistake of fact which resulted in a total failure of consideration.

It is unnecessary for me to review all the authorities cited by both sides on the subject of rescission of contract after completion. All of them and many more were examined with great care as recently as 1956 by the High Court of Australia in *Svanosio* v. *McNamara*.[5] In that case by a contract in writing the defendant agreed to sell to the plaintiff the land described therein together with the licensed premises known as the "Bull's Head Hotel" erected thereon, the victualler's licence in respect of the hotel and the goodwill thereof. The plaintiff made no requisitions or objections to title and did not have any survey made of the land. After completion it was discovered that the hotel stood partly only on the land conveyed and partly on the adjoining Crown land. The plaintiff claimed that the agreement in writing and the conveyance were entered and executed by the parties under a common mistake as to the existence of a fact accepted by them as a basis or condition fundamental to the transactions, namely, that the defendants were the owners of the whole land upon which the hotel was erected; and the plaintiff asked the court for (a) a declaration that each of the transactions was at all material times void, (b) an order setting aside the agreement and the conveyance and (c) repayment of the purchase price. The High Court of Australia held (1) the fact of such a mistake did not render the contract void; (2) as the transfer of the licence was the principal part of the consideration the contract was not discharged for want of consideration; (3) the conveyance was not void and was effective to vest in the plaintiff the legal and beneficial interest in the land conveyed; (4) in the absence of fraud or misrepresentation the plaintiff was not entitled to the equitable relief he sought.

The principle enunciated by the High Court after a very careful and exhaustive examination of the case law is this: equity will not undo a sale of land after conveyance on the ground of mistake unless there has been a total failure of consideration. Dixon C.J. and Fullagar J. in their joint judgment observed:

> "In considering whether equitable relief can or should be granted to the appellant, we may confine our attention to contracts for the sale of land: .. .. .. With regard to transactions relating to land, equitable relief after conveyance was granted in *Bingham* v. *Bingham; Hitchcock* v. *Giddings; Cooper* v. *Phibbs*, and *Hart* v. *Swaine*. In every case of this type, however, which has been found, the position simply was that the vendor had no title at all to the property sold. In *Bingham* v. *Bingham* the land was actually the property of the purchaser himself. In such cases a court of equity is not called upon to undo anything. The conveyance is simply devoid of legal effect, and, if it were not for the fact that adjustments and allowances will generally have to be made, one would think that the money paid could be recovered at law. Apart from this very special type of case, it is clearly established that equity will not undo a sale of land after conveyance unless there has been fraud or there is such a discrepancy between what has been sold and what has been conveyed that there is a total failure of consideration, or what amounts practically to a total failure of consideration."

The same view was expressed by McTiernan, Williams and Webb JJ. in their joint judgment:

> "It may be possible in exceptional cases to obtain relief on the ground of common mistake after a contract for the sale of land has been completed. But the cases must be very rare. They are unlikely to go beyond cases where there has been a total failure of consideration. One case is where it is found, after completion, that the purchaser and not the vendor is the owner of the land so that the purchaser is really paying for his own property. In *Bingham* v. *Bingham* the plaintiff had contracted to purchase land from the defendant, to which the defendant had no title although he believed that he had, which was the property of the plaintiff. The defendant conveyed the land to the plaintiff by deed of lease and release. It was contended that it was the plaintiff's own fault as the title deeds had been produced to him and he had had time to examine the title and the maxim *caveat emptor* applied. But it was held that there was a plain mistake and a court would not suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right. This was a case where the mistake was so fundamental that there was a total failure of consideration. The plaintiff had paid to the defendant the purchase money for land which was the property of the plaintiff. In *Cooper* v. *Phibbs* there was also a total failure of consideration. The plaintiff had agreed to lease a fishery of which he was, unknown to him, the tenant for life from the defendant who had no title at all to the property. In *Solle* v. *Butcher* the Court of Appeal by a majority (Bucknill L.J. and Denning L.J., Jenkins L.J., dissenting) held that 'an executed lease can be set aside on the ground that the parties were induced to enter into it by a common mistake."

As has been stated above the conveyance dated the 30th June 1961 has been declared null and void. That being so, the issue before me is whether or not the third defendant is now entitled to recover from the first and second defendants the amount he paid to them as purchase money.

There is no doubt that in this case there was a mutual mistake. Both parties believed that the vendors were in fact mortgagees and were conveying the property in exercise of their power of sale as mortgagees. The true position is that the owner of the property never mortgaged the property to the vendors and they never had any right whatsoever to deal with the property. It is clear that this is a case where the mutual mistake was fundamental, and that the mutual mistake resulted in a total failure of consideration.

A purchaser who after completion of the contract discovers that he has obtained a defective title to the land may sue for rescission of the contract and the return of the purchase-money, if the agreement of sale was entered into under a mistake, common to both parties, as to some fact which was a condition precedent to their contracting; see *Williams* on Vendor and Purchaser, 4th edition, volume II, page 1072; see also

34 *Halsbury's* Laws of England, 3rd Ed. page 380. This remedy is additional to the remedy upon the covenant for title, if any. In the present case I am only concerned with the third defendant's claim for the return of the purchase-money on the ground of mutual fundamental mistake. This relief, in my view, may undoubtedly be granted even after conveyance where there has been a total failure of consideration.

In my judgment the third defendant is clearly entitled to succeed on the ground of mutual fundamental mistake resulting in total failure of consideration.

For these reasons I hold that the third defendant is entitled to recover from the first and second defendants the whole of the purchase-money. There will be judgment for the third defendant against the first and second defendants for the sum of $6,687.75 and costs as taxed.

Judgment for 3rd defendant.

Solicitors: *Mallal & Namazie; Eber & Tan*; *Hilborne, Chung & Co.*

TAN HUNG CHIANG v. ANG KONG HWEE

[O.C.J. (Ambrose J.) October 10, 1964]
[Singapore — Suit No. 1035 of 1963]

Damages — Personal injuries — Negligence of passenger — Whether driver liable.

Negligence — Passenger in taxi opening taxi door when it was not safe to do so — Whether taxi driver owes a duty of care to third persons.

A passenger in a taxi driven by the defendant, and which the latter had just stopped by the side of a one way street, negligently opened a door to alight when it was not safe to do so. The door hit the forearm of the plaintiff who was passing in his car. The plaintiff brought an action against the defendant for damages for personal injuries.

Held: the defendant was not under duty to third persons to see that his passenger did not commit an act of negligence in leaving his taxi.

[**Editorial Note:** As to the liability of passengers see also cases summarised in *Bingham's* All the Modern Cases on Negligence, 2nd Edn. pp. 206-207 and *Schuster* v. *Whitehead* (1959) 21 D.L.R. 609, C.A.].

CIVIL SUIT.

H. E. Cashin for the plaintiff.

K. C. Chan for the defendant.

Cur. Adv. Vult.

Ambrose J.: This action is brought to recover damages for personal injuries sustained by the plaintiff in an accident which occurred on the 24th December, 1962, when he was driving a motor car along South Bridge Road, Singapore, which is a one-way street for south-bound traffic.

The statement of claim alleges that the defendant was driving a taxi along the same road and in the same direction as the plaintiff's car; that the taxi suddenly stopped; that the front near-side door of the taxi was opened by a passenger; that the door struck the plaintiff and caused a laceration of his right forearm; and that the accident was caused solely by the defendant's negligence.

The defendant admits in his defence that he was driving the taxi on the day in question; that the front near-side door was opened by a passenger in the taxi; and that an accident happened; but he alleges that the accident was caused solely by or contributed to by the plaintiff's negligence.

The plaintiff's version of the accident is as follows. About 10.40 a.m. on the day in question he was driving a motor car along South Bridge Road in a southerly direction in front of the magistrates' courts at a speed of 20 to 30 miles per hour and about 5 to 6 feet from the right-hand edge of the road. His car was following a taxi which was about 15 to 20 feet ahead of him. Near the junction with Upper Pickering Street the taxi slowed down after giving a signal, and swerved a little to the right. The plaintiff put out his right arm to indicate that he was slowing down. The taxi-driver put up his right forearm to indicate that he was going to stop. The taxi stopped at a hydrant, which is about 10 feet to the south of the junction of Upper Pickering Street and South Bridge Road. The off-side of the taxi was in line with the middle of the back of a car which was parked in front of it. While the plaintiff's car was passing the stationary taxi the near-side front door of the taxi was opened. The plaintiff withdrew his right arm but had no time to do so completely. The door of the taxi hit his forearm near the elbow and also the off-side of the plaintiff's car.

This is the defendant's version of the accident. A Chinese female passenger was seated in the taxi on the front seat next to him. She wished to alight at the junction of Upper Pickering Street and South Bridge Road. The taxi passed the magistrates' courts at a speed of 10 to 20 miles per hour along the right-hand side of the road. The defendant put out his right hand to indicate that he was going to the right, and then put up his right forearm to indicate that he was going to stop. He slowed down. He passed Upper Pickering Street, which was on his right, and stopped near a hydrant about 3 feet from the edge of the road. The female passenger handed him the fare. He asked her to be careful. Her hand was near the handle of the near-side front door. She opened the door. He heard a bang. She got out from the taxi and walked away, The near-side front door was twisted. The plaintiff's car moved forward about 30 feet and stopped.

It seems to me that the taxi was involved in